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Vol. 237

PRETORIA, 10 NOVEMBER 1994

No. 5053

PREMIER'S NOTICE

OFFICE OF THE PREMIER

No. 25

10 November 1994

It is hereby notified that the Premier has assented to the following Act which is hereby published for general information:

No. 2 of 1994: Provincial Tender Board Act
(Pretoria–Witwatersrand–Vereeniging)

T T
1994

ACT

To provide for the regulation of the procurement of goods and services for, the disposal of movable property of, and the hiring or letting of anything or the acquisition or granting of any right for or on behalf of, the Province, and to that end to establish a Tender Board and to define its functions; and to provide for incidental matters.

*(English text signed by the Premier)
(Assented to 10 November 1994)*

PREAMBLE

Whereas there is a need to establish a Provincial Tender Board that will create a public, fair and open system for purchasing goods and services for the provincial government, it shall be created with a system of balances: between minimising the cost and the promotion of small and medium sized local enterprises; between preference to disadvantaged groups and fairness and efficiency; between simplifying the tendering process to ensure accessibility and the legal requirements to ensure compliance with the consequent contract; and between the need for confidentiality of commercial information and transparency in adjudication;

And whereas there is a need to democratize the tendering process to ensure accessibility, accountability, transparency and economic equitability at all levels, the Provincial Tender Board shall seek to eliminate practices that restrict the entry of efficient and competitive new businesses as participants in the tendering process;

And whereas the commitment to the reconstruction and development programme should guide the aims and objectives of the Provincial Tender Board;

BE IT ENACTED by the Provincial Legislature of the Province of Pretoria–Witwatersrand–Vereeniging, as follows:—

Definitions

1. In this Act, unless the context otherwise indicates—

“Board” means the Tender Board established in terms of section 3(1);

“employee” means an employee as defined in section 1 of the Public Service Act, 1994 (Proclamation No. 103 of 1994), employed by the Province;

“interests” for the purpose of section 4(12) include interests of a member of the Board directly or indirectly, be it pecuniary or otherwise, in the outcome of the adjudication of any matter before the Board;

“officer” means an officer as defined in section 1 of the Public Service Act, 1994, employed by the Province;

“Premier” means the Premier of the Province acting in accordance with section 147(2) of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993);

“Province” means the Province of Pretoria–Witwatersrand–Vereeniging contemplated in section 124(1)(h) of the Constitution of the Republic of South Africa, 1993;

“Provincial Legislature” means the Provincial Legislature of the Province;

“Standing Committee” means the Standing Committee of the Provincial Legislature responsible for financial matters;

“the responsible Member” means the member of the Executive Council of the Province responsible for financial matters;

“this Act” includes any regulation made under section 11 and any directives issued under section 5(1)(i);

“Treasury” means the Provincial Treasury as defined in section 1 of the Provincial Exchequer Act, 1994.

PART I

THE TENDER BOARD

Objectives of Tender Board

2. The Board shall be responsible for—

- (a) promoting the use of public, fair and open competition in the procurement of goods and services;
- (b) establishing policies, procedures and practices to ensure the procurement of goods and services of the requisite quality within the time available, having regard to the lowest possible cost, the promotion of small and medium sized enterprises, and of employment generation;

- (c) minimising fraud or any other irregularities in the procurement of goods and services;
- (d) eliminating unnecessary overlapping or duplication of functions;
- (e) achieving greater uniformity and simplicity in the tendering process;
- (f) promoting efficiency and effectiveness in the procurement of goods and services and promoting the commitment to the aims and objectives of the reconstruction and development programme and, if necessary, setting specific objectives;
- (g) ensuring the provision of an advisory service to promote accessibility to and knowledge of the tendering process;
- (h) encouraging the widest range of participants by empowering disadvantaged groups to compete equally in the tendering process;
- (i) promoting fair and transparent dealings with all parties to provincial contracts;
- (j) advising the responsible Member on any other matters relating to provincial procurement of goods and services; and
- (k) seeking to eliminate collusion between companies or persons or companies and persons in the supply of goods and services, and to encourage sub-contracting to enterprises controlled by persons from disadvantaged groups and to smaller enterprises;

Establishment of Tender Board

3. (1) As from a date to be fixed by the Premier by proclamation in the *Provincial Gazette*, there shall be established and independent and impartial Tender Board for the Province to deal, with the procurement of all goods and services for the Province, subject to the provisions of section 187(2) of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993).

(2) A reference to the State Tender Board envisaged in section 2 of the State Tender Board Act, 1968 (Act No. 86 of 1968), in any law or document pertaining to the procurement of goods and services for the Province shall be deemed to be a reference to the Board.

Constitution of Board

4. (1) The Board shall consist of not less than 12 and not more than 16 members, of whom not more than four shall be officers or employees, and only one of these officers or employees may be an employee of the Board.

(2) No person shall be qualified to become or remain a member of the Board, if he or she is a member of the National Assembly, the Senate, a provincial legislature or a local authority.

(3) In composing the Board, race, gender, the required skills and experience shall as far as practicable be taken into account.

(4)⁽¹⁹⁷⁾(a) A member of the Board shall not be appointed until the responsible Member has invited interested parties by notice in the *Provincial Gazette* and an advertisement in the media regarded as appropriate by the responsible Member to nominate within 21 days of the publication of such notice candidates for consideration.

(b) The names of the nominees shall be published in the said *Gazette* and media.

(c) A member of the Board shall be appointed by the responsible Member after consultation with the Standing Committee whose deliberations shall be open to the public.

(d) The final list of appointees shall include both genders.

(e) The final list of appointees shall be published in the said *Gazette* and media.

(5) Subject to subsection (6), the responsible Member shall designate any member of the Board as chairperson and any other member as vice-chairperson, and the latter shall act as chairperson of the Board when the chairperson is absent or is unable to perform his or her duties, and when both the chairperson and the vice-chairperson are absent from a meeting of the Board, the members present thereat may elect one of their number to preside at such meeting.

(6) No member of the Board who is an officer or employee may preside at a meeting of the Board.

(7) Subject to the provisions of subsection (8), a member of the Board shall hold office for such period, not exceeding three years, as the responsible Member may determine at the time of his or her appointment, but he or she shall, subject to subsections (1), (2), (3) and (4), be eligible for reappointment at the termination of his or her term of office: Provided that—

(a) at least half of the members of the Board shall not be so reappointed;

(b) no member of the Board shall serve more than two terms consecutively and not more than three terms in total;

(c) a member of the Board shall, where practicable, be appointed prior to the completion of the term of office of the previous member, but not later than 90 days after such term has expired; and

(d) a member of the Board who has served his or her term of office shall vacate his or her office only when the new member has been appointed.

(8) A member of the Board shall vacate his or her office—

(a) if he or she resigns or becomes disqualified in terms of subsection (2);

(b) if he or she absents himself or herself from two consecutive meetings of the Board unless such absence is condoned by the Board and the responsible Member;

- (c) if his or her term of office is terminated under subsection (9); or
- (d) if he or she is declared insane or insolvent by a court of law.

(9) The responsible Member may at any time suspend or terminate the term of office of any member of the Board if there are sound reasons for doing so, such as misconduct or the inability to perform his or her duties effectively.

(10) If a member of the Board dies, or vacates his or her office in terms of subsection (8), the responsible Member may, subject to the provisions of subsection (3) and after consultation with the Standing Committee, appoint a person in the place of that member for the unexpired term of office of that member.

(11) A member of the Board who is not in the fulltime service of the Province, may, in respect of his or her service, be paid such remuneration and allowances as may be determined by the responsible Member in accordance with the rates determined by the Provincial Treasury.

(12) Every member of the Board shall declare his or her interests as defined in section 1 in any matter before the Board, and the Board may request a member to recuse himself or herself from all discussions, deliberations and decisions involving his or her interests.

Powers of Board

5. (1) Subject to the provisions of this Act and any other law, the Board shall have the power to procure goods and services for the Province, to arrange the hiring or letting of anything or the acquisition or granting of any right for or on behalf of the Province, and to dispose of movable property of the Province, and may for that purpose—

- (a) on behalf of the Province, conclude an agreement with a person within or outside the Province;
- (b) with a view to concluding an agreement referred to in paragraph (a), in any manner it may deem fit but subject to section 2, invite offers and determine the manner in, and the conditions subject to, which such offers shall be made, and shall in this tender process promote public participation;
- (c) inspect and test or cause to be inspected and tested goods and services which are offered or which are or have been furnished in terms of an agreement envisaged in paragraph (a), and anything offered for hire;
- (d) accept or reject any offer for the conclusion of an agreement envisaged in paragraph (a): Provided that the Board—
 - (i) shall not be obliged to accept the lowest or any offer;
 - (ii) may, if the offer relates to more than one item, accept such offer in respect of any specific item or items or part thereof; and
 - (iii) may accept any offer notwithstanding the fact that the offer was not made in response to the particular tender invitation, or does not comply with the tender conditions set out in the tender invitation;

- (e) take steps or cause steps to be taken to enforce an agreement concluded under paragraph (a);
- ^{NE}(f) on behalf of the Province, rescile from any agreement concluded under paragraph (a), and, in an appropriate case, claim damages;
- (g) on such conditions as it may determine, subject to the provisions of subsection (2), exempt any person with whom an agreement under paragraph (a) has been concluded from compliance with such agreement, or condone the failure of such person to comply with such agreement;
- (h) subject to the provisions of subsection (2), negotiate a settlement with a person referred to in paragraph (g), or amend the agreement concerned with the approval of such person;
- (i) issue directives to departments in the administration of the Province in order to achieve the objects of this Act;
- (j) invite expert or technical advice, and request any officer or employee to provide expert or technical advice; and
- (k) make recommendations to the responsible Member and the Standing Committee on the simplification of the tender process in order to achieve the objectives set out in section 2.

(2) No exemption, condonation, settlement or amendment which may be the prejudice of the Province shall be granted, negotiated or made under paragraphs (g) and (h) of subsection (1) without the prior approval of the Treasury.

(3) Any approval envisaged in subsection (2) may on application be granted by the Treasury in respect of a specific agreement or in respect of two or more or all agreements.

(4) The Board may, with the approval of the responsible Member in each case, and on such conditions, including conditions regarding compensation, as the responsible Member may approve, exercise any power which the Board may exercise for and on behalf of the Province under this Act, for and on behalf of any body established by or under any Act of the Provincial Legislature, or any other body.

(5) The Board may, if extraordinary circumstances warrant it, and with the approval of the responsible Member, authorize or condone non-compliance by the Province with any condition, procedure, instruction or directive laid down by the Board.

(6) (a) If a person has failed to comply with any of the conditions of an agreement, or has performed unsatisfactorily under an agreement or has promised, offered or given a bribe, or has acted in respect of an agreement in a fraudulent manner or in bad faith or in any other improper manner, the Board may, in addition to any other legal action it may take—

- (i) cancel any agreement with that person; and
- (ii) resolve that no offer from that person shall be considered during a period determined by the Board.

(b) If any offer or action of a person in the execution of an agreement constitutes an offence under any law, the matter shall be referred to the Attorney-General, and if a court of law convicts that person of such an offence, the Board may, in addition to any other legal action it may take—

- (i) ignore such offer from that person without first advising him or her thereof;
- (ii) cancel any agreement with that person; and
- (iii) resolve that no offer from that person shall be considered during a period determined by the Board.

(c) The restrictions envisaged in paragraphs (a) and (b) may also be imposed by the Board on any person who acted as envisaged in those paragraphs in respect of any other Provincial Tender Board or the National State Tender Board.

(d) The Board may at any time vary or rescind any restriction imposed under paragraph (a), (b) or (c).

(7) If an agreement has been concluded with any person on the strength of information furnished by him or her in respect of which, after the conclusion of such agreement, it is proved that such information was incorrect, the Board may, in addition to any other legal action it may take—

- (a) recover from that person any costs incurred or any damages sustained by the Province as a result of the conclusion of the agreement; or
- (b) terminate the agreement and recover from that person any damages which the Province may suffer by having to make less favourable arrangements thereafter.

(8) In addition to what is prescribed in the regulations and any other legal remedies the Board may have, the Board may determine the terms and conditions on, and the manner in, which a benefit may be recovered.

Committees of Board, and delegation of powers

6. (1) The Board may from among its members appoint committees and designate a chairperson for every such committee.

(2) The Board may from time to time delegate any of its powers, subject to subsection (7), to any of its committees, any person (including any member of the Board), any body of persons or the holder of any post in the administration of the Province designated by the Board.

(3) Where the Board has delegated any power under subsection (2), it may authorize the committee, person, body of persons or holder of the post concerned to delegate that power to any other person, other body of persons or the holder of another post in the administration of the Province.

(4) Any delegation envisaged in subsection (2) or (3) may be made subject to such conditions and restrictions as may be determined by the Board.

(5) The Board shall not be divested of any power delegated by it under subsection (2) or under its authority under subsection (3) and may amend or withdraw any decision made in the exercise of such delegation, including any decision to delegate under subsection (3).

(6) Where any power has been delegated to the holder of a post in the administration of the Province, that power may be exercised by the person who acts in that post.

(7) (a) The power of the Board to conclude agreements on behalf of the Province may only be delegated up to such amounts as may be determined from time to time by the responsible Member in consultation with the Board and the Standing Committee in respect of each delegate or category of delegates envisaged in subsection (2).

(b) Such delegation shall be made subject to the condition that the delegate shall in each case follow the procedures prescribed in the regulations.

(c) The Board shall arrange random independent audits of the agreements concluded by each delegate.

Decisions of Board

7. (1) The quorum for a meeting of the Board shall be a majority of the members of the Board, of which officers and employees shall not be the majority.

(2) No decision of the Board or act performed under authority of the Board shall be invalid by reason only of a vacancy on the Board, or of the fact that a person who was not entitled to sit as a member of the Board sat as a member at the time when the decision was taken or the act was authorized, if the decision was taken or the act was authorized by the majority, prescribed by regulation, of the members of the Board who were present at the time and entitled to sit as members.

(3) Without derogating from the provisions of section 187 of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993)—

- (a) no person shall improperly interfere with the deliberations of the Board;
- (b) all the deliberations of the Board shall be recorded;
- (c) all deliberations of the Board on a particular matter shall remain confidential until the Board has officially conveyed its decision on that matter to the persons concerned;
- (d) the Board shall give notice in the *Provincial Gazette* and in other media regarded as appropriate by it, of all tenders awarded, and details of every agreement concluded by it under this Act shall be open to public examination; and
- (e) in the interests of accountability and transparency the Board shall on request make known its decisions to interested parties without infringing on the right of any other body to confidentiality.

PART II

GENERAL

Annual report

8. The Board shall, within 60 days after the end of the financial year of the Board, submit a written report on its activities during the preceding year to the responsible Member, who shall table it in the Provincial Legislature within seven days.

Expenditure

9. Subject to the provisions of this Act, or an agreement concluded under this Act, all expenditure in connection with the performance of the functions and the exercise of the powers of the Board shall be defrayed from moneys appropriated by an Act of the Provincial Legislature for that purpose.

Administrative work

10. (1) All administrative work, including the payment and receipt of moneys, in connection with the performance of the functions and the exercise of the powers of the Board shall be performed by officers and employees designated by the head of the department in the administration of the Province responsible for the board.

(2) The chairperson of the Board or any other member of the Board designated by the Board shall be competent to execute all documents on behalf of the Board.

Regulations

11. (1) The responsible Member, after consultation with the Standing Committee—

(a) shall make regulations regarding—

- (i) the procedure to be followed in connection with the conclusion of agreements by delegates envisaged in subsection 6 (7);
- (ii) the submission of partial offers to tenders in order to promote small and medium sized enterprises;
- (iii) the use of the *Provincial Gazette* and other media in order to promote public awareness of tenders and the tendering process;
- (iv) the use of geographically dispersed advisory offices and the local media in order to bring the tendering process closer to the people; and
- (v) the terms, conditions and manner that may be determined by the Board under section 5(8); and

(b) may make regulations regarding—

- (i) the detailed composition of the board subject to section 4, the calling of, and procedure at, meetings of the Board or any committee thereof, including the manner of voting and the number of votes required for a decision of the Board or a committee thereof;
- (ii) any other matter in order to achieve or promote the objects to this Act.

(2) (a) Regulations made in terms of subsection (1) shall be tabled in the Provincial Legislature within 14 days of their promulgation.

(b) Any such regulation or any provision thereof may be annulled by the Provincial Legislature by resolution passed during the same session during which it was tabled whereupon such regulation or provision shall cease to be of force and effect.

(c) The provisions of paragraph (b) shall not derogate from the validity of anything done in terms of that regulation or provision before the date upon which it so ceased to be of force and effect, or from any right, privilege, obligation or liability acquired, accrued or, incurred at the said date in terms of such a regulation or provision.

(3) The responsible Member may, in consultation with the Standing Committee, appoint any member of the Board as a representative to the National State Tender Board if so required.

(4) Until such time as the responsible Member has made regulations under this section, or the Board has issued directives under section 5(1)(i), the Regulations made under the State Tender Board Act, 1968 (Act No: 86 of 1968), and any directives issued under such Regulations, as far as they could have been made or issued under this section, as the case may be, shall *mutatis mutandis* apply in respect of the Province.

Short title and commencement

12. This Act shall be called the Provincial Tender Board Act, 1994.

MEMORANDUM ON THE OBJECTS OF THE PROVINCIAL TENDER BOARD BILL, 1994

The object of the Provincial Tender Board Bill is to provide for a Provincial Tender Board to be established enabling the Provincial Government to—

- ▶ procure supplies and services;
- ▶ dispose of movable property;
- ▶ hire or letting anything; and
- ▶ acquire or grant any right for or on behalf of the Province.

The Bill makes provision for:—

Clause 1 Definitions of essential terms referred to in the Bill.

Clause 2 Objectives of the Provincial Tender Board are set out.

Clause 3 Establishment of the Provincial Tender Board.

Clause 4 Constitution of the Board and the method of its appointment are detailed.

- Clause 5 Powers of the Board are fully described.
- Clause 6 Provision is made for the Board to appoint committees from amongst its members and to delegate certain of its powers to the committees or other persons.
- Clause 7 Provision is made concerning decisions of the Board.
- Clause 8 An annual report is required.
- Clause 9 Expenditure in connection with the performance of the functions and the exercising of the powers of the Board shall be defrayed from moneys appropriated, by the Provincial Legislature.
- Clause 10 All administrative work shall be performed by officers and employees designated by the head of department responsible for the Board.
- Clause 11 The Member of the Executive Council responsible for financial matters may make regulations and until such time as the said regulations are promulgated, the regulations currently in force for the State Tender Board will be applicable.

Section 187 of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), provides as follows:

Procurement administration

187. (1) The procurement of goods and services for any level of government shall be regulated by an Act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.
- (2) The tendering system referred to in subsection (1) shall be fair, public and competitive, and tender boards shall on request give reasons for their decisions to interested parties.
- (3) No organ of state and no member of any organ of state or any other person shall improperly interfere with the decisions and operations of the tender boards.
- (4) All decisions of any tender board shall be recorded.

The object of the Bill is therefore to give effect to this provision of the Constitution and to provide for the regulation of the procurement of goods and services for, the disposal of movable property of, and the hiring and letting of anything or the acquisition or granting of any right for or on behalf of the Province, and to that end to establish a Tender Board which shall be responsible for—

- (a) promoting the use of public, fair and open competition in the procurement of goods and services;
- (b) establishing policies, procedures and practices to ensure the procurement of goods and services of the requisite quality within the time available, having regard to the lowest possible cost, the promotion of small and medium sized enterprises, and of employment generation;

- (c) minimising fraud or any other irregularities in the procurement of goods and services;
- (d) eliminating unnecessary overlapping or duplication of functions;
- (e) achieving greater uniformity and simplicity in the tendering process;
- (f) promoting efficiency and effectiveness in the procurement of goods and services, and promoting the commitment to the aims and objectives of the reconstruction and development programme and, if necessary, setting specific objectives;
- (g) ensuring the provision of an advisory service to promote accessibility to and knowledge of the tendering process;
- (h) encouraging the widest range of participants by promoting equal opportunity to everyone;
- (i) promoting fair and transparent dealings with all parties to provincial contracts;
- (j) advising the responsible Member on any other matters relating to provincial procurement of goods and services; and
- (k) seeking to eliminate collusion between companies or persons or companies and persons in the supply of goods and services and to encourage sub-contracting to enterprises controlled by persons from disadvantaged groups and to smaller enterprises.

The Tender Board shall consist of not less than 12 and not more than 16 members, of whom not more than four shall be public servants who may not preside at a meeting of the Board. The members of the Board shall be appointed by the Member of the Executive Council responsible for financial matters after consultation with the relevant Standing Committee whose deliberations shall be open to the public.

The Board shall have the powers set out in clause 5, some powers of which may, under clause 6, also be delegated to a committee of the Board, a member, any body of persons or the holder of a post in the administration of the Province.

In terms of clause 7 the Board shall give notice in the *Provincial Gazette* and other media of all tenders awarded, and details of every agreement concluded under the Bill shall be open to examination by the public.

Provision is also made for regulations to be made by the responsible Member after consultation with the Standing Committee on any other matter in order to achieve the objects of the Bill.

A working document on the establishment of a Provincial Tender Board was prepared by the national Department of State Expenditure. The Bill was then drafted and subsequently tabled in the Provincial Legislature. After the Bill was referred to committee, written and oral submissions were received and considered by the Standing Committee on Finance. These submissions significantly influenced the development of the Bill.

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